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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

Case No. 931.

LYNCHBURG TRAFFIC BUREAU (CORP.),
Appellant,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees.

PETITION OF APPELLANT FOR REHEARING

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Comes now appellant under Rule 58, Rules of the Supreme Court of the United States and file this petition for a rehearing by this Court of cause and then for the Court to grant the relief sought. In support thereof appellant respectfully shows as follows:

THE FIRST POINT

This is an action to set aside an order and report of a three judge district court affirming an order and report of the Interstate Commerce Commission issued in Docket

33831 holding that the rate to Danville on coal of 360 cents a ton when applied at Lynchburg does not result in an unjust or unreasonable rate at Lynchburg. The holding is contrary to former decisions of the Commission finding that a reasonable and just rate is a rate made 50 cents a ton lower to Lynchburg than to Danville. A complaint was filed with the Commission because (a) the rail carriers established a carload rate on fine coal of 360 cents a ton in lieu of a rate of 435 cents a ton from mines on the lines of said rail carriers to Danville, Virginia, a point more distant from the said mines by 67 miles than Lynchburg and (b) they continued in effect a rate of 382 cents a ton to Lynchburg until a rate of 360 cents was established at Lynchburg and then refused to reestablish the former relationship of 50 cents a ton in rates between Danville and Lynchburg. The action of the rail carriers in establishing a rate of 360 cents a ton applicable through Lynchburg to Danville to take the place of a rate of 435 cents a ton, and continuing the rate of 382 cents a ton to Lynchburg until the rate to Danville of 360 cents a ton was made effective at Lynchburg, Virginia, placed Lynchburg, then and now, at an unnatural disadvantage resulting in unlawful rates at Lynchburg. The Commission dismissed the complaint and a three judge district court upheld the Commission. This Court granted the motion to affirm. Both decisions are wrong as will appear from the record.

The Interstate Commerce Commission has, since 1900, prescribed lower rates on coal to Lynchburg than it prescribed to Danville. This fact is borne out by two decisions of the Commission. The first is Ashland Coal and Ice v. A.C.L. 256 I.C.C. 429 (decided in 1943) where a rate of 205 cents a ton was prescribed to Lynchburg for a distance

of 195 miles which was subsequently increased to 382 cents and the second case is Danville Chamber of Commerce v. Southern Railway 191 I.C.C. 20, where the Commission prescribed a rate of 255 cents a ton to Danville for a distance of 271 miles via Lynchburg which was subsequently increased to 435 cents. It is thus clear that the Commission, pursuant to the Interstate Commerce Act, has fixed, since 1943, a rate relationship of 50 cents a ton lower to Lynchburg than to Danville and that the said 50 cents a ton difference in the rates reflected the difference in cost of rendering transportation service to Lynchburg and Danville. Therefore, regardless of what the rate to Danville may be or the cause for the establishment of the rate of 360 cents to Danville, those things cannot justify the same rate at Lynchburg and Danville as the Commission has prescribed a different rate for Lynchburg and Danville. The difference in transportation conditions in the movement of coal to Danville and Lynchburg justifies a rate of 50 cents a ton lower to Lynchburg than to Danville, and the Commission has so held. That difference can only be changed based upon evidence of the rail carriers showing that the cost and transportation conditions are the same to Lynchburg and Danville. There is no evidence of record showing that the transportation conditions are the same to Lynchburg and Danville; hence, the same rate to Lynchburg as to Danville is not a reasonable and just rate to Lynchburg. Therefore, the decision of the Commission in this proceeding holding that the rate to Danville is proper at Lynchburg is not supported by any evidence. This Honorable Court is respectfully requested to correct the aforesaid wrong.

The rail carriers defended the charging of the same rate at Lynchburg and Danville on the ground, among

others, that the rate of 360 cents to Danville was established to meet competition between fine coal and natural gas at Danville. The evidence does not support such a contention as the evidence does not show any actual or potential competition at Danville between fine coal and natural gas. Assuming that there is competition at Danville between fine coal and natural gas, still that fact alone, even if true, dose not warrant or justify the destruction of the relationship of 50 cents a ton the Commission fixed between Danville and Lynchburg. In order to change that difference in rates or in the relationship, the record must show affirmatively that the said destruction of the 50 cents differential resulting in the same rates to both points is justified not because of competition between two fuels but because the transportation conditions justify the same rate to both points. The record does not show that the cost of rendering service to Danville and Lynchburg is the same. Consequently, the decision is unsupported by evidence. In fact, Congress directed the Commission in Section 15a(2) 49 U.S.C. 15a(2) as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

In this proceeding, the Commission ignored all of the above requirements in passing upon the lawfulness of the assailed rate to Lynchburg. The Commission gave only consideration to the proposition of whether the defendant carriers could reduce the rate to Danville to meet alleged competition between fine coal and natural gas. The Commission did not give proper consideration to its former decision holding that a difference in rates of 50 cents a ton is justified by a difference in transportation conditions between the two points when the Commission considered the lawfulness of applying the same rates at Lynchburg and Danville. The rail carriers may meet competition provided in meeting it the rates established do not violate other provisions of the Act. Here the reduced rate to Danville does violate the Act as the Commission has prescribed a rate to Lynchburg made 50 cents a ton less than the rate prescribed to Danville.

The Interstate Commerce Act provides that all charges made for any service rendered or to be rendered in the transportation of property *shall* be just and reasonable and every unjust and unreasonable charge is prohibited and declared to be unlawful (49 U.S.C. 1(5)). The Commission, pursuant to that section, prescribed in 1943 as a just and reasonable rate to Lynchburg a rate of 50 cents lower than the rate the Commission prescribed to Danville, and the difference in the rates is justified based upon a difference in the cost of rendering transportation service to Lynchburg and Danville. The difference in rates of 50 cents a ton cannot be destroyed unless there is evidence of record showing that the cost of rendering the service is the same to Lynchburg for 195 miles as it is to Danville for 271 miles. There is no evidence supporting the proposition that the cost in rendering the service is the same to Lynch-

burg as it is to Danville. Consequently, there is no evidence of record here to support a finding that a rate of 360 cents to Lynchburg is not unjust or unreasonable in view of the former decisions of the Commission and the difference in transportation conditions between Danville and Lynchburg.

The evidence shows that the rate to Lynchburg must be at least 50 cents a ton lower than the rate is to Danville and in the absence of affirmative evidence showing that Lynchburg is not entitled to a rate made 50 cents a ton less than the rate to Danville, the report and order of the Commission must be set aside as being contrary to the evidence.

Section 1(5) of the Act 49 U.S.C. 1(5), requires, regardless of whether the competition is justified or not or whether the Fourth Section departures are authorized or not authorized, that all charges be just and reasonable. It is the contention of appellant that the Commission is bound by its former decisions which were *based on evidence of record* in those decisions showing the transportation costs and conditions in transporting coal to Lynchburg and Danville are different and that the difference in costs and transportation conditions justifies a rate of 50 cents a ton lower to Lynchburg than the rate is to Danville. There is no evidence of record here showing that the transportation conditions and the cost of rendering the service to Lynchburg and Danville are the same to Lynchburg as they are to Danville and in the absence of such evidence, the former decision of the Commission prescribing a difference of 50 cents a ton must stand. These facts from the record, appellant believes, are sufficient to justify the granting of this petition and they clearly establish the fact that the report and order are not supported by evidence.

In other words, the record here shows that the order and report of the Commission, if permitted to stand, means that the Commission itself is forcing Lynchburg to purchase transportation service on coal on a higher mile for mile level of rates than the mile for mile level of rates the Commission permits Danville to purchase transportation service on fine coal. This conclusion is obvious from the record as the prior report of the Commission shows that the rates must be 50 cents a ton lower to Lynchburg than to Danville because of the difference in distance and transportation conditions existing between the two points. In this proceeding the Commission is holding that the same rate on coal to Danville and Lynchburg does not make the Danville rate when applied at Lynchburg unjust and unreasonable at Lynchburg. Congress did not intend that the Act should be administered so as to permit one community to purchase transportation service on the same commodity on a more favorable term than another community can purchase such service.

THE SECOND POINT

The motion to affirm should have been denied. The reason appellant believes the motion should have been denied is that it is provided in 28 U.S.C. 1253 that any party may appeal a decision of a three judge court to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any civil action, suit, or proceeding required by an Act of Congress to be heard and determined by a district court of three judges. The statute quoted, appellant believes, creates as a matter of right, the right to be fully heard on appeal by this Honorable Court to the same extent as that right is allowed from a district court to a court of appeals.

This action is one that Congress provided should be heard by a three judge district court, 28 U.S.C. 2325 and under 28 U.S.C. 1253, a direct appeal to the Supreme Court is permitted. It would seem that this Court should not have granted the motion to affirm filed by appellees, but rather should have overruled the motion. In support thereof, attention is directed to the provisions of 28 U.S.C. 2284 and 2325 allowing appellant the right to appeal the decision of the Commission to a court of three judges and for that court to hear and determine after hearing whether or not the order and report of the Commission should be enjoined and set aside. It is felt since an appeal is allowed as a matter of right in civil case from a district court to a court of appeals, that the same right should be allowed from a district court of three judges to the Supreme Court.

Attention is also directed to Amendment One of the Constitution of the United States which provides that:

> "Congress shall make no law respecting the right of the people to petition the government for a redress of grievance."

Appellant here petitioned the government for redress of the wrong the rail carriers committed against appellant by charging the same rate on coal at Lynchburg as they charge at Danville, when the Interstate Commerce Commission, a branch of the government, previously had found from evidence based on costs of rendering service and distances that Lynchburg is lawfully entitled to a rate on coal made 50 cents a ton below the rate to Danville. The redress was denied and that denial was wrong as the Commission had already fixed a difference of 50 cents a ton in the rates on

coal between Lynchburg and Danville. The Commission justified the charging of the same rate at Lynchburg as at Danville on the premises that the rail carriers had a right to show preference to Danville in rates on coal on an alleged theory that natural gas and fine coal were competitive at Danville. The existence of the competition was not established by evidence nor was the destruction of the aforesaid differential of 50 cents a ton justified by any valid transportation conditions or reasons. The evidence of record shows that the Commission in its former decision had found that a difference of 50 cents a ton should exist between the rate to Lynchburg and the rate to Danville and it was a substantial error for the Commission to disregard its prior finding which was based on evidence that justified a difference of 50 cents a ton in the rates and to hold here without any evidence to justify the destruction of the difference of 50 cents a ton that the rate to Danville when applied at Lynchburg is not unjust or unreasonable.

CONCLUSION

It is the position of appellant that Amendment One to the Constitution contemplates a full hearing before this Court on the merits of the grievances and the granting of this petition is directed to the sound discretion of this Court rather than being directed to technical rules and past decisions. Appellant for the above reasons believes that this Honorable Court should take jurisdiction of this appeal and determine whether or not the Commission can disregard its former decision in the absence of evidence to support its disregard of these decisions and determine all

issues raised. Appellant believes that the appeal should be allowed and the relief sought granted.

Respectfully submitted.

LYNCHBURG TRAFFIC BUREAU
By: W. G. BURNETTE, *Attorney*

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June 18, 1964

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Appellant, hereby certify that I have this 18 day of June, 1964, served a copy of the foregoing document upon the Appellees by mailing a copy thereof to:

Thomas B. Mason, Esq., United States Attorney for Western District of Virginia, Room ....., Federal Building, Lynchburg, Virginia.

The Solicitor General, Department of Justice, Washington 25, D. C.

John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D. C.

William H. Orrick, Jr., Esq. Asst. Attorney General, Washington 25, D. C.

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